No. 05-363

IN THE

Supreme Court of the United States

JACQUES SAINTAUDE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PREJUDICE IS PRESUMED WHEN THE PERFORMANCE OF A DEFENSE COUNSEL IS ADVERSELY AFFECTED BY AN ACTUAL CONFLICT OF INTEREST CREATED BY THE COUNSEL'S CONCERN OVER HIS PROFESSIONAL REPUTATION.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jacques Saintaude, Jr., by and through counsel, prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces rendered in this case on June 23, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (App., *infra*, 1a – 18a) is reported at 61 M.J. 175 (C.A.A.F. 2005). The second opinion of the Army Court of Criminal Appeals (App., *infra*, 19a - 21a) was unpublished. *United States v. Saintaude*, Army 9801647 (A. Ct. Crim. App. Oct. 15, 2003) (unpublished). The initial opinion of the

Army Court of Criminal Appeals (App., *infra*, 22a – 48a) is reported at 56 M.J. 888 (A. Ct. Crim. App. 2002).

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Army Court of Criminal Appeals on June 23, 2005 (App., *infra*, 1a-18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Rule for Courts-Martial 506(a) provides, in relevant part, "the accused has the right to be represented before a general or special court-martial by civilian counsel if provided at no expense to the Government, and either by the military counsel detailed under Article 27 or military counsel of the accused's own selection, if reasonably available."

STATEMENT OF THE CASE

The duty of loyalty is perhaps the most basic of counsel's duties. *Hoffman v. Leeke*, 903 F.2d 280, 287 (4th Cir. 1990), citing *Strickland v. Washington*, 446 U.S. 668, 692 (1984). In the present case, Petitioner's lead military defense counsel suffered from a division of loyalties wherein his personal interests in protecting his professional reputation adversely affected his loyalty to his client. As a result of this conflict, counsel attempted to remove civilian counsel from

the case without Petitioner's knowledge, abandoned Petitioner during trial, and failed to adequately prepare for presentencing.

Private First Class (PFC) Saintaude is an active duty enlisted soldier in the United States Army. During the pre-trial and trial stages of his 1999 general court-martial at Fort Carson, Colorado, he was represented by a defense team that included various combinations of three military defense counsel and three civilian counsel.

In May 1998, PFC Saintaude retained two civilian attorneys[1] in Colorado Springs, Colorado, to represent him on civilian charges arising from the robberies of two convenience stores. Civilian authorities relinquished jurisdiction over the robbery charges to the United States Army after PFC Saintaude was identified as the alleged perpetrator in a March 1998 rape of the wife of a soldier in his military unit. PFC Saintaude was ultimately charged by the Army with rape, two specifications of robbery, adultery, and three specifications of wrongfully communicating a threat, in violation of Articles 120, 122, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 922, and 934 (1998).

PFC Saintaude kept his two civilian counsel and was detailed[2] a military defense counsel, Captain (CPT)

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[1] Henry Gotten and Patricia Cook were not only law partners but were engaged to be married to each other. They wed shortly before PFC Saintaude's trial on the merits began.

[2] Article 27(a), UCMJ, 10 U.S.C. § 827 (a), provides for defense counsel to be detailed for each general court-martial. Assistant and associate defense counsel may also be detailed. The initial military defense counsel from Fort Carson TDS Office assigned to represent PFC Saintaude withdrew from the case because of a conflict of interest, and CPT Bleam was subsequently detailed.

Roseanne Bleam, from the U.S. Army Trial Defense Service (TDS), Fort Carson Field Office[3] to represent him on all pending military charges. Upon CPT Bleam's request for assistance, CPT Michael Clarke, the senior military defense counsel at the Fort Leavenworth TDS Field Office, was appointed as additional military defense counsel. CPT Clarke functioned as the lead military defense counsel in PFC Saintaude's case.

In early September 1998, prior to the first session of trial,[4] the prosecution filed a motion to remove one of the civilian counsel from the case over an allegation that he attempted to bribe a government witness.[5] As a result of the motion, both civilian counsel moved to withdraw as counsel. PFC Saintaude consented to the withdrawal of his civilian counsel and retained, on their recommendation, another civilian counsel, Jacob M. Dickenson IV of Memphis, Tennessee.

During the same court session, PFC Saintaude asked the military judge to remove CPT Bleam from his case because he distrusted her. The military judge denied PFC Saintaude's request and ordered CPT Bleam to remain on the

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[3] The U.S. Army Trial Defense Service, a unit within the U.S. Army Judge Advocate General's Corps, is tasked with assigning Army defense counsel to represent Army personnel at courts-martial. The Trial Defense Service is divided into geographic regions, which are, in turn, divided into field offices. The field offices at Fort Carson and Fort Leavenworth, KS, both fall under Region III.

[4] A court-martial session conducted on the record out of the presence of the members is known as an "Article 39a hearing," so derived from its UCMJ authority, 10 U.S.C. § 839(a).

[5] The government also recommended removal of Ms. Cook since she was Mr. Gotten's law partner and fiancée. An investigation by the Army Standards of Conduct Office ultimately determined that the allegations were unfounded.

case as local liaison for CPT Clarke and Mr. Dickinson. At a subsequent hearing, PFC Saintaude consented to her remaining on the defense team.

On October 5, 1998, one week prior to a scheduled pretrial session to litigate motions, CPT Clarke sent a memorandum to his immediate supervisor, the Regional Defense Counsel, in which he identified reasons why he believed Mr. Dickinson was incompetent. Clarke Memorandum, App., *infra*, 49a - 57a. CPT Clarke requested decertification[6] of Mr. Dickinson to practice before military courts and, in the alternative, that military counsel be permitted to withdraw from the case because he believed that "further participation" in the case could jeopardize his and CPT Bleam's "good standing to practice law." *Id.* at 57a. CPT Clarke also advised his supervisor that Mr. Dickinson had been suspended from practicing law but was since reinstated.[7]

CPT Clarke never relayed to PFC Saintaude his concerns about Mr. Dickinson's ineffectiveness or that he attempted to get Mr. Dickinson barred from practicing before courts-martial. Both military counsel and Mr. Dickinson remained on PFC Saintaude's case as it proceeded to trial.

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[6] Decertification is the functional equivalent of disbarment from practicing before courts-martial.

[7] Mr. Dickinson's law license had been suspended for two years in 1983 for assault, alcohol abuse, using illegal drugs (including in the presence of clients and at his office), and for forcing a female acquaintance, against her will, to engage in sexual intercourse. He was not reinstated until 1987. CPT Clarke was advised by a public defender in Memphis, Tennessee, that "Mr. Dickinson doesn't know Tennessee law and he sure doesn't know military law." Clarke Memorandum, App. 53a. The public defender even told CPT Clarke that he would not let Mr. Dickinson "walk his dog." *Id.*

PFC Saintaude was convicted of all charges and sentenced to, *inter alia*, confinement for 48 years.

PFC Saintaude appealed his conviction and sentence to the Army Court of Criminal Appeals pursuant to Article 66(c), UCMJ, 10 U.S.C. § 966(c). Alleging violation of his Sixth Amendment right to counsel, PFC Saintaude asserted that his military and civilian counsel were ineffective and had labored under conflicts of interest. The Army Court of Criminal Appeals affirmed the convictions with the exception of the three specifications alleging wrongful communication of threats, which they set aside for reasons unrelated to the Sixth Amendment issues. The Army Court of Criminal Appeals found that PFC Saintaude's defense team provided ineffective assistance of counsel during presentencing only, set aside the sentence, and authorized a sentence rehearing.

At a sentence rehearing conducted in October 2002, PFC Saintaude was sentenced to, *inter alia*, confinement for 35 years. Upon continuing its appellate review, the Army Court of Criminal Appeals affirmed the rehearing findings and sentence.

The United States Court of Appeals for the Armed Forces granted review on PFC Saintaude's conflict of interest and ineffective assistance of counsel claims. Noting that appellate courts have varied in their determination of whether a conflict of interest should be viewed as "inherently prejudicial" if the conflict does not involve multiple representation, the Court specifically declined to apply the "inherent prejudice" standard announced by this Court in *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980), and instead analyzed both issues under *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Saintaude*, 61 M.J. 175, 179-80 (C.A.A.F. 2005).

REASONS FOR GRANTING THE PETITION

A. A Grant of Review Would Permit This Court to Resolve a Split Among The Circuits And to Establish Clear Guidance on The Appropriate Standard to Apply in Conflict of Interest Cases That Do Not Involve Multiple Representation Issues.

Petitioner's case provides good cause for review by this Court because the federal circuits are fractured as to whether conflict of interest cases which involve actual conflicts of a nature other than multiple representation should be analyzed under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) or under *Strickland v. Washington*, 466 U.S. 668 (1987). This splintered approach subjects criminal defendants to disparate treatment based solely upon the jurisdiction in which they file their appeal. Moreover, it increases the risk that a trial judge who is aware of a conflict will fail to conduct a sufficient inquiry into the conflict due to the confusion over the appropriate standard.

In *Cuyler v. Sullivan*, this Court held that in order to establish a Sixth Amendment violation involving multiple representation, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler*, 446 U.S. at 348. If he makes such a showing, he need make no showing of prejudice because prejudice is presumed. *Id* at 349. In contrast, under *Strickland v. Washington*, an appellant alleging ineffective assistance of counsel must show not only that his counsel was deficient, but that he was prejudiced by the deficiency. *Strickland*, 466 U.S. at 694. Thus, under *Strickland*, a defendant must show prejudice in order to prevail on a Sixth Amendment claim involving his right to counsel.

In *Mickens v. Taylor*, which involved a successive multiple representation conflict, this Court noted that the *Sullivan* standard had been applied "unblinkingly" by numerous circuit courts of appeal to potential conflicts not involving multiple representation. *Mickens v. Taylor*, 535 U.S. 162, 174 (2002), citing *Beets v. Collins*, 65 F.3d 1258, 1266 (5th Cir. 1995) (*en banc*). The majority opinion inferred that a hierarchy existed with respect to conflict cases, with concurrent multiple representation cases as among the most serious conflicts warranting application of the *Cuyler* standard. In stating that "[n]ot all attorney conflicts present comparable difficulties" as those posed by concurrent multiple representation claims, the Court did not rule out the possibility that some other type of conflict might present comparable difficulties. *Mickens*, 535 U.S. at 175. The Court expressed that whether *Sullivan* is the appropriate standard to apply in successive representation cases is "an open question." *Id.* at 176. Thus, by implication, the standard to apply to conflict cases not involving multiple representation remains an open question as well.

Notwithstanding the Court's refusal in *dicta* in *Mickens* to apply *Sullivan* to any situation beyond concurrent multiple representation cases, several circuit courts continue to apply, or will consider applying, the *Sullivan* standard to cases not involving concurrent multiple representation. *See e.g.*, *United States v. Fuller*, 312 F.3d 287, 291 (7th Cir. 2002) (applying *Sullivan* analysis to situation where defendant claimed counsel did not properly advise him to withdraw his guilty plea because of counsel's interest in shielding himself from malpractice claim that he had given client inadequate advice); *United States v. Mota-Santana*, 391 F.3d 42, 46 (1st Cir. 2004) (leaving open application of *Sullivan* standard in cases where conflict of interest involves client and attorney rather than multiple clients; "[W]e hasten to recognize that differences between counsel and client can be so deep,

pervasive and well-founded that effective legal assistance has been severely handicapped."); *Quince v. Crosby*, 360 F.3d 1259 (11th Cir. 2004) (rejecting claim under both *Sullivan* and *Strickland* that defense counsel labored under conflict due to status as special deputy sheriff); and *Herring v. Dept. of Corr.*, 397 F.3d. 1338 (11th Cir., 2005) (holding it is not unreasonable for state supreme court to apply *Sullivan* standard to case where defense counsel was a special deputy sheriff).

The Court of Appeals for the Armed Forces is among those circuits which indicate a willingness to apply *Sullivan* to conflict cases not involving multiple representation. *See United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004) (recognizing an inherently prejudicial conflict existed where assigned military defense counsel engaged in homosexual activity with his enlisted client, notwithstanding the fact that counsel negotiated a favorable pretrial agreement for the soldier). Although *Cain* and Petitioner's case both involved personal interest conflicts on the part of defense counsel rather than multiple representation conflicts, the Court of Appeals for the Armed Forces disregarded its own precedent and erroneously applied the *Strickland* standard in Petitioner's case.

Other circuits have expressed a lack of certainty as to the application of *Sullivan* after *Mickens*. *See Covey v. United States*, 377 F.3d 903, 907 (8th Cir. 2004) ("In this circuit, it is unclear whether we limit application of *Cuyler* to conflicts involving multiple or serial representation."); *Smith v. Hofbauer*, 312 F.3d 809 (6th Cir. 2002) (holding petitioner's claim for writ of habeas corpus did not rest on clearly-established federal precedent when he relied on *Sullivan* analysis to argue that a conflict of interest was created by the fact that his attorney was prosecuted in the same county as he was); and *Whiting v. Burt*, 395 F.3d 602

(6th Cir. 2005) (stating district court erred in applying *Sullivan* analysis to conflict claim based on fact that same attorney represented petitioner on trial and appeal).

The Fifth Circuit looks to the nature of the conflict in selecting the standard to apply to conflict of interest cases. It applies *Sullivan* to multiple representation conflict cases but not to conflicts involving the personal interests of an attorney. *See, United States v. Infante*, 404 F.3d 376, 389 (5th Cir. 2005). In *Infante*, the Fifth Circuit noted its reluctance to embrace *Mickens* because unique facts in *Infante* made the distinction between successive and concurrent representation barely distinguishable and because the court "continue[s] to be bound by circuit precedent applying *Sullivan* to cases of successive representation." *Infante*, 404 F.3d at 391.

Clear guidance as to the proper standard is necessary to protect the Sixth Amendment right to effective assistance of counsel. Without such guidance, counsel and judges both at the trial and appellate levels must guess what standard is going to govern conflicts other than those involving concurrent multiple representation. As noted in *Mickens*, this Court "must lay down rules that can be followed in the innumerable cases [it is] unable to review. . . ." *Mickens*, 535 U.S. at 167 n.1. A grant of review would permit this Court to issue such guidance as to the correct standard to apply in conflict cases not involving multiple representation.

B. Petitioner's Lead Military Defense Counsel Labored Under a Conflict of Interest Caused by His Belief That Continued Association With a Civilian Counsel Whom He Believed to be Incompetent Would Negatively Impact His Good Standing to Practice Law.

A defendant alleging a Sixth Amendment conflict of interest violation must demonstrate an actual conflict of interest adversely affecting his counsel's performance. *Mickens*, 535 U.S. at 172. An actual conflict of interest arises whenever a counsel "actively" represents "conflicting interests." *Id.* at 175. In the case at bar, military defense counsel indeed suffered from a division of loyalties, as evidenced by his memorandum to his supervisor expressing his concern over his good standing to practice law if forced to remain on Petitioner's case with civilian counsel. Although obligated to zealously represent the soldier entrusted to his care, CPT Clarke's greater manifested loyalty was to his own personal interests.

Although this Honorable Court is not tasked with enforcing the canons of legal ethics, *id.* at 176, such rules nevertheless serve as guidance to defense counsel, especially in those instances where public defenders, who are given little choice in accepting or rejecting a client, may pause in their duties to consider the personal impact of representing a particularly unpopular client. Counsel's own interests, should not be permitted to adversely affect their representation of a client.[8]

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[8] "The professional judgment of a lawyer should be exercised, within the bounds of law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interest of other clients, nor the desires of third persons should be

The American Bar Association Model Rule of Professional Conduct 1.7(d) states that" a lawyer shall not represent a client if the representation of that client may be materially limited by the . . . lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation..." Model Rule of Prof'l Conduct R. 1.7(d) (1980). In cases where additional counsel has been employed, "inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to the client for resolution and the decision of the client shall control the action to be taken." Model Code of Prof'l Responsibility Canon 5-12 (1980).

In his memorandum, CPT Clarke demonstrated his reluctance to be associated with an attorney whom he considered to be hopelessly incompetent because, among other things, Mr. Dickinson failed "to understand the relevant law" and lacked "a competent defense plan." Clarke Memorandum, App., *infra*, 52a, 56a. He made it clear that if Mr. Dickinson remained on the case, military counsel should be permitted to withdraw lest the continued association with incompetent counsel tarnish their good standing to practice law.

A judge advocate's good standing to practice law impacts not only on his reputation as an attorney but also his reputation as a military officer, which is a significant factor affecting the progression of his military career. Not only is it a measure of how readily accepted an officer is by his seniors, peers, and subordinates, but it also impacts performance evaluations, receipt of awards and

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permitted to dilute his loyalty to his client." Model Code of Prof'l Responsibility Canon 5-1 (1980).

commendations, future assignments, promotions, and postgraduate education.

PFC Saintaude raised no objection at trial to CPT Clarke's conflict because he was unaware of the conflict. CPT Clarke failed to advise PFC Saintaude that he believed that Mr. Dickinson was incompetent, that he had requested that Mr. Dickinson be decertified to practice military law, and that he was concerned that his professional reputation would be imperiled if he remained on the case with Mr. Dickinson. Instead, CPT Clarke abdicated his role as counsel, clearly placing his personal interests over those of his client.

C. The Adverse Effect of The Conflict of Interest on The Part of PFC Saintaude's Lead Military Defense Counsel Was Manifested by His Efforts to Have Civilian Counsel Removed Without The Client's Knowledge, His Abandonment of The Client During Trial on The Merits, and His Failure to Adequately Prepare for Presentencing.

A "division of loyalties" must affect counsel's performance in order to establish the constitutional predicate for a conflict of interest claim. *Mickens*, 535 U.S. at 172 n.5. In the present case, CPT Clarke's loyalty to his own personal interests adversely affected the nature and quality of representation he provided to PFC Saintaude. CPT Clarke repeatedly breached his duty to PFC Saintaude in his efforts to distance himself from Mr. Dickinson.

First, CPT Clarke unilaterally attempted to have PFC Saintaude's counsel of choice decertified from practice.

Additionally, he never shared his concerns about Mr. Dickinson's competence with PFC Saintaude.

Second, CPT Clarke abandoned PFC Saintaude during the trial on the merits. Court reporter notes and comments on the record from the military judge reflect that after opening statements, CPT Clarke was only present at counsel table for a brief evidentiary hearing on the second day of a four-day proceeding. He was generally absent from the courtroom, although for the latter stages of the trial on the merits, he sat in the gallery. When asked by the military judge whether CPT Clarke's absences were with his permission, PFC Saintaude responded "yes." PFC Saintaude however, could not have made a knowing waiver of CPT Clarke's presence because he was unaware of CPT Clarke's conflict.

Finally, the conflict of interest manifested itself in CPT Clarke's lack of preparation during presentencing. For example, after announcing to the military judge that he would be speaking for the defense team during presentencing,[9] CPT Clarke did not ask a single question on cross-examination of the rape complainant or the other two witnesses who testified during pre ntencing, perhaps because he had been absent from their testimony on the merits. The presentencing case for the defense consisted only of a short stipulation of expected testimony from PFC Saintaude's mother and an eighty-eight word unsworn statement by PFC Saintaude. However, there was readily-available mitigation information from a military supervisor, friends, family, and a pastor, as shown in letters submitted post-trial. Additionally, CPT Clarke, whose client was facing a life sentence, requested that PFC Saintaude receive

[9] Although active during the merits portion of the case, Mr. Dickinson was virtually mute during the presentencing stage, which was handled by the two Army counsel.

a sentence to confinement for 21 years, a specific term of years that he failed to discuss with PFC Saintaude beforehand.

Although the Army Court of Criminal Appeals found ineffectiveness during presentencing and directed a new sentencing hearing, that remedy does not ameliorate the impact of CPT Clarke's conflict of interest, which permeated the entire trial. The presence at trial of one counsel without a conflict does not overcome the deficiency of counsel with a conflict of interest. *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). The defense team never functioned as a coherent force while the lead military defense counsel placed his own self-interests above his duty to his client.

Because there was an actual conflict of interest which adversely impacted CPT Clarke's performance, the test in *Cuyler v. Sullivan* was the appropriate standard to apply. Instead, the Court of Appeals for the Armed Forces assessed and rejected PFC Saintaude's conflict of interest claim under the more rigorous *Strickland* standard, notwithstanding the absence of a definitive ruling by this Court as to the applicable standard for conflict of interest claims not involving multiple representation. Neither the Army Court of Criminal of Appeals nor the Court of Appeals for the Armed Forces fully appreciated the invasive impact of CPT Clarke's conflict of interest on the entire trial proceedings. While this Court has intimated that *Sullivan* does not apply to every potential conflict of interest case, it has never affirmatively indicated that *Sullivan* would not apply to a conflict such as the one presented here.

A grant of certiorari would permit this Court to decide whether there are conflict of interest scenarios not involving multiple representation where – such as in PFC Saintaude's case – the *Strickland v. Washington* analysis is "inadequate

to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CASE OF

UNITED STATES, Appellee

v.

Jacques SAINTAUDE Jr.,
Private First Class
U.S. Army, Appellant

No. 04-0178

Crim. App. No. 9801647

United States Court of Appeals for the Armed Forces

Argued January 26, 2005
Decided June 23, 2005

EFFRON, J., delivered the opinion of the Court, in which GIERKE, C.J., and CRAWFORD, BAKER, and ERDMANN, JJ., joined.

Military Judges: Richard J. Hough (trial) and Donna L. Wilkins (sentence rehearing)

Judge EFFRON delivered the opinion of the Court.

At a general court-martial composed of officer members, Appellant was convicted, contrary to his pleas, of rape, robbery (two specifications), adultery, and

communication of a threat (three specifications), in violation of Articles 120, 122, and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 920, 922, 934 (2000)*. He was sentenced to a dishonorable discharge, confinement for forty-eight years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved these results and credited Appellant with 194 days of confinement for pretrial confinement served. The United States Army Court of Criminal Appeals set aside the three specifications of communicating a threat, and affirmed the remaining findings. The court also concluded that Appellant's trial defense counsel provided ineffective assistance during sentencing, and ordered a rehearing on the sentence. *United States v. Saintaude, 56 M.J. 888 (A. Ct. Crim. App. 2002)*.

At the rehearing, a panel consisting of officers and enlisted members sentenced Appellant to a dishonorable discharge, confinement for thirty-five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence and credited Appellant with 1,615 days of presentence confinement credit and 196 days of administrative credit for illegal presentence confinement. The Court of Criminal Appeals affirmed in an unpublished opinion. United States v. Saintaude, Army 9801647 (A. Ct. Crim. App. Oct. 15, 2003).

On Appellant's petition, we granted review of the following issues, which primarily concern the findings phase of Appellant's initial court-martial:

I. WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO CONFLICT-FREE COUNSEL WHEN ALL FIVE OF HIS COUNSEL LABORED UNDER MENTALLY-COMPETING PERSONAL INTERESTS.

II. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON THE MERITS WHEN HIS COUNSEL FAILED TO PREPARE AND EXECUTE A REASONABLE DEFENSE STRATEGY, INCLUDING FAILURE TO USE CRITICAL IMPEACHMENT EVIDENCE, AND WHEN HIS MILITARY COUNSEL FAILED TO ADVISE APPELLANT THAT HE BELIEVED THAT CIVILIAN COUNSEL WAS INCOMPETENT, INEFFECTIVE, AND UNPROFESSIONAL.

We shall first consider Issue I, Appellant's contention that the personal interests of his attorneys conflicted with their duty of professional loyalty to their client. We shall then turn to Issue II, in which Appellant alleges specific deficiencies in the performance of the various attorneys who represented him before and during trial. For the reasons set forth below, we conclude that neither the alleged conflicts of interest nor the alleged defects in performance of counsel resulted in prejudicial error, and we affirm. See *Strickland v. Washington, 466 U.S. 668, 686, 694 (1984).*

I. BACKGROUND

From the time Appellant was charged until the beginning of the trial on the merits, Appellant was

represented by a number of different attorneys, at different times, in various combinations. The relationships among counsel, and between counsel and Appellant, were not always harmonious.

A. Representation in the separate military and civilian proceedings

Initially, Appellant faced separate civilian charges and military criminal charges. In the civilian proceedings, brought by Colorado state authorities, he was represented by two civilian attorneys, Mr. HG and Ms. C. The civilian charges, which consisted of two robbery specifications, alleged that Appellant robbed two 7-Eleven convenience stores while pretending to be concealing a firearm.

In the military proceedings, Appellant was represented initially by Captain (CPT) L, who withdrew from the case because he previously represented one of the alleged victims. CPT L was replaced by CPT RB. The military charges consisted of rape, adultery, and three specifications of the communication of a threat.

B. Representation in the exclusive military proceedings

After civilian authorities relinquished jurisdiction over the two robbery charges, Appellant retained Mr. HG and Ms. C to represent him in the military proceedings. Appellant continued to retain CPT RB as his military counsel. In addition, CPT MC, a defense attorney stationed at Fort Leavenworth, Kansas, was eventually detailed as an assistant defense counsel at CPT RB's request.

C. The prosecution's motion to disqualify civilian counsel

At the initial pretrial session under Article 39(a), UCMJ, *10 U.S.C. § 839(a) (2000)*, the prosecution moved to disqualify the civilian defense counsel, Mr. HG, based on allegations that he had attempted to bribe a prosecution witness. The prosecution also recommended disqualification of the other civilian counsel, Ms. C, who was engaged to Mr. HG and shared his law practice. In a subsequent investigation, the Army determined that the bribery allegations against Mr. HG were unsupported.

D. Replacement of civilian counsel

At the next *Article 39(a)* session, while the prosecution's disqualification motion was pending, the two civilian counsel moved to withdraw from representing Appellant. They also identified Mr. D, who was present as a spectator in the courtroom, as the attorney who would replace them as Appellant's civilian counsel. After determining that Appellant agreed to the withdrawal of his civilian defense counsel, and that he intended to retain Mr. D, the military judge granted the motion by Mr. HG and Ms. C to withdraw.

E. Defense request to remove military counsel

At the same session, Appellant asked the military judge to remove his military defense counsel, CPT RB, based on Appellant's assertion that CPT RB had revealed confidences to the prosecution. The military judge declined the request, noting that CPT RB was needed as a liaison between the new civilian defense counsel, Mr. D, and the remaining military defense counsel, CPT MC, neither of whom were located in the Fort Carson area. The military judge added, however, that he would reconsider Appellant's request to remove CPT

RB after the other counsel had an opportunity to prepare for trial. In a subsequent proceeding, at the outset of the trial on the merits, the military judge specifically addressed the issue of whether Appellant wanted CPT RB to serve as his military defense counsel. Appellant responded that he wanted to retain CPT RB. The Army conducted a separate investigation into the allegation that CPT RB improperly revealed defense confidences and concluded that the allegation was unfounded.

F. Disagreements regarding trial strategy

During preparations for trial, the relationship between CPT MC and Mr. D deteriorated to the point where CPT MC filed a memorandum with the Regional Defense Counsel asserting that Mr. D was "incompetent and intended to represent the accused in a manner that [was] ineffective and unprofessional." The memorandum primarily criticized Mr. D's intent to focus on what CPT MC viewed as unsubstantiated allegations of unlawful command influence and command-level drug abuse. CPT MC stated that the unlawful command influence allegation initially was raised by Mr. HG, who apparently claimed that there was a conspiracy to frame Appellant. CPT MC added that Mr. D improperly accepted the assertion that the entire case was infected with unlawful command influence without ascertaining the facts or considering the relevant principles of law. CPT MC stated that he repeatedly told Mr. D that he did not agree with his assessment and repeatedly tried to focus Mr. D away from the conspiracy and onto the relevant issues of the case. CPT MC viewed the unlawful command influence strategy as being dictated by Mr. D's friendship with the prior defense counsel, Mr. HG.

The memorandum also criticized Mr. D for delays in obtaining relevant files from Mr. HG. CPT MC attributed

the delay to Mr. D's unwillingness to press the issue in light of his friendship with Mr. HG. According to CPT MC, Mr. D's representation was marred by an inability to address the conflict between the duties to his client and his desire to vindicate his friend, Mr. HG.

The memorandum also expressed CPT MC's concern that Mr. D's performance reflected unfamiliarity with the military and military justice system. CPT MC stated he "repeatedly explained to [Mr. D] the procedure for obtaining expert assistance[,]" yet Mr. D failed "to acknowledge the necessary steps that needed to be taken to secure expert assistance." He also mentioned that Mr. D previously had been suspended from the practice of law based upon substance abuse and that CPT MC had heard unfavorable comments from a public defender familiar with Mr. D's practice. CPT MC concluded his memorandum with the notation: "I do not believe my efforts to focus [Mr. D] on the relevant issues of the case have been successful or will be successful in the future . . . . I believe further participation in this case could jeopardize CPT [RB's] and my good standing to practice law."

CPT MC asked the regional defense counsel to arrange either for the decertification of Mr. D or to permit the military defense counsel to withdraw from the case. The record does not reflect what action, if any, the regional defense counsel took in response to CPT MC's memorandum.

Ultimately, Mr. D was not decertified; neither CPT MC nor CPT RB asked the military judge for permission to withdraw; nor did they bring any of these matters to the attention of the military judge or Appellant. The defense obtained expert assistance; Mr. HC transmitted the requested files to the defense; and the defense did not file any motions

regarding unlawful command influence or command-level drug abuse.

G. Evidence on the merits presented by the prosecution

During Appellant's trial, the prosecution introduced evidence concerning two convenience store robberies that occurred on the same day, each committed by a male pretending to have a concealed firearm. The prosecution presented evidence that each of the robberies was committed by Appellant, including recorded surveillance videos and the testimony of employees working at the convenience stores at the time of the robberies. Additionally, Private (PVT) D, a fellow servicemember and friend of Appellant, identified the robbery perpetrator in the surveillance videos as Appellant. PVT D also stated that the person in the videos was wearing a jacket he had loaned to Appellant.

With respect to the rape charge, the prosecution presented the testimony of Ms. P, who provided details of the charged offense and identified Appellant as the perpetrator. Ms. P testified that she received a call from a man who said that he was from her husband's unit. Shortly thereafter, the man came to her apartment and said that Ms. P's husband had spoken to him about needing automobile insurance. During their conversation, she became uncomfortable with the situation and asked him to leave. He refused and raped her while her five-month old son was nearby. In the course of leaving the apartment, he told her that if she reported the incident her husband would lose his job and she would lose her family. The sexual assault nurse who examined Ms. P testified that the results of the examination were consistent with rape.

A friend of Ms. P, who lived in the same apartment complex, provided testimony of a similar incident on the

same day. She testified that a man called her, identified himself as from her husband's unit, and then came to her apartment. She did not let him in. Later in the day, while at a gas station, a man approached her and said that he had been at her apartment earlier. She subsequently reported the incident to the police, provided a description of the man similar to the description given to the police by Ms. P, and identified Appellant as this man.

A DNA expert testified that there was a positive match between Appellant's DNA and the sperm extracted from Ms. P during her sexual assault exam. The expert stated that a positive match between the two samples would only occur in "1 in 4 million 500 thousand African-Americans; 1 in 5 million 300 thousand Caucasians; and 1 in 1 million 900 thousand Southwestern Hispanics."

H. The defense position on the merits

The defense endeavored to convince the court-martial that Appellant was not the perpetrator of the robberies or of the rape. The defense raised the possibility that another soldier from Appellant's unit, Private First Class JJ -- who bore a strong resemblance to Appellant -- committed the crimes. The defense also offered an alibi defense through the testimony of a coworker that Appellant was at work at the time Ms. P was raped.

The defense challenged the reliability of the evidence identifying Appellant as the perpetrator of the charged crimes. The defense sought to undermine the testimony of the convenience store employees on the grounds that their identification testimony was biased and tainted. The defense challenged the identifications of Appellant by Ms. P and her friend on grounds that the photo lineup was biased and the identifications were tainted by the discussion of the lineup

between Ms. P and her friend. The defense also sought to demonstrate that Ms. P's identification was further tainted by a discussion that she had with her husband regarding Appellant's presence in the lineup.

The defense challenged the testimony of PVT D, who had identified Appellant on the convenience store's surveillance videotapes. According to the defense, PVT D was biased, and was trying to protect himself from prosecution. The defense noted that PVT D had tested positive for cocaine, and, at one point, had been considered a suspect for the charges facing Appellant.

The defense also challenged the DNA evidence, focusing on Appellant's origins in the Virgin Islands. According to the defense, the DNA database maintained by the FBI did not provide an accurate basis for matching the DNA of Appellant because Appellant came from a subpopulation not proportionately represented in the database.

II. CONFLICTS OF INTEREST

A. Standard of review

In the first granted issue, Appellant asserts that his attorneys labored under conflicts of interest, and that these conflicts resulted in the denial of his constitutional right to the effective assistance of counsel. *U.S. Const. amend. VI.* In particular, Appellant claims his counsel had the following conflicts: CPT RB leaked confidential defense information; Mr. HG and Ms. C were more concerned with allegations of bribery than with his case; CPT MC placed his concern for his license over his loyalty to Appellant; and Mr. D placed his friendship with Mr. HG and Ms. C over his duty to

Appellant. We review such claims de novo. See *United States v. Key, 57 M.J. 246, 249 (C.A.A.F. 2002).*

An appellant "who seeks to relitigate a trial by claiming ineffective assistance of counsel must surmount a very high hurdle." *United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997).* Such an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*"; and (2) that the "deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 229 (quoting *Strickland, 466 U.S. at 687).* If we conclude that any error would not have been prejudicial under the second prong of *Strickland,* we need not ascertain the validity of the allegations or grade the quality of counsel's performance under the first prong. *466 U.S. at 697.* See also *United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001).*

Conflicts of interest, like other actions by an attorney that contravene the canons of legal ethics, do not necessarily demonstrate prejudice under the second prong of *Strickland.* See *Mickens v. Taylor, 535 U.S. 162, 175-76 (2002); Nix v. Whiteside, 475 U.S. 157, 165 (1986).* Although cases involving concurrent representation of multiple clients have been treated as inherently prejudicial, see *Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980),* "'not all attorney conflicts present comparable difficulties,' and . . . most cases will require specifically tailored analyses in which the appellant must demonstrate both the deficiency and prejudice under the standards set by *Strickland.*" *United States v. Cain, 59 M.J. 285, 294 (C.A.A.F. 2004)* (quoting *Mickens, 535 U.S. at 175-76).*

Appellate courts have applied varying approaches to the question of whether a conflict of interest should be viewed as inherently prejudicial if the conflict does not involve multiple representation. Compare *United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980)* (applying an inherent prejudice standard to a conflict arising outside a multiple representation situation), with *Beets v. Sullivan, 65 F.3d 1258, 1265-66 (5th Cir. 1995)* (applying the *Strickland* standard to a conflict arising outside the multiple representation situation). Under our precedents, the question of whether there is inherent prejudice in a conflict between the self-interest of an attorney and the interests of the client must be assessed on a case-by-case basis. In *United States v. Babbitt, 26 M.J. 157 (C.M.A. 1988)*, for example, we concluded that a conflict involving sexual relations during trial between a male civilian attorney and his married female military client should be tested for actual prejudice, and we determined that there was no prejudice.

In *Cain, 59 M.J. at 295*, we focused on the specific circumstances of the case -- a homosexual relationship between a military attorney and a military client, "involving an attorney's abuse of a military office, a violation of the duty of loyalty, fraternization, and repeated commission of the same criminal offense for which the attorney's client was on trial," all of which was left unexplained as a result of defense counsel's suicide, which occurred shortly after being questioned about these matters by a superior. In light of those factors, we concluded that "the uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest . . . ." *Id.* The present case does not involve the unusual combination of factors that led us to determine in *Cain* that the conflicts were inherently prejudicial. Under these circumstances, we conclude that the present case should be reviewed for specific prejudice under *Strickland*.

B. Potential conflicts of interest

Appellant has identified a number of potential conflicts between the self-interests of his attorneys and his interests as their client. Under *Strickland*, identification of a potential deficiency is not sufficient. To surmount the high hurdle presented by the second prong of *Strickland*, an appellant must demonstrate specific prejudice. In the present case, Appellant has not done so because he has not demonstrated that any of the potential conflicts described below developed into deficiencies so serious as to deprive him of a fair trial, that is, a trial whose result was reliable. See *Strickland, 466 U.S. at 687.*

1. *CPT RB*

Appellant originally moved to remove CPT RB based on a belief that she had revealed confidences in Appellant's case to trial counsel. According to Appellant, CPT RB was conflicted because the accused thought she had committed an ethics violation. Prior to trial on the merits, however, Appellant decided not to pursue this course of action, and affirmatively advised the military judge that he wished to retain CPT RB as counsel. A subsequent Army investigation found that the allegation of improper disclosure was unsupported. The results of that investigation, which have not been challenged by Appellant, are consistent with Appellant's decision to retain CPT RB as counsel.

2. *Mr. HG and Ms. C*

Appellant contends that Mr. HG and Ms. C were conflicted as a result of the allegation that Mr. HG had attempted to bribe a witness. After the Government made the allegation, however, both counsel withdrew from Appellant's representation. The allegation against Mr. HG

subsequently was found to be unsupported. Mr. HG and Ms. C did not abandon Appellant, but instead assisted him in obtaining new civilian counsel, Mr. D. At that time, Appellant was represented by two military counsel, CPT RB and CPT MC, as well as having a new civilian defense counsel recommended by Mr. HG and Ms. C.

3. *CPT MC -- Trial strategy*

Relying on a pretrial memorandum sent by CPT MC to the Regional Defense Counsel, Appellant contends that CPT MC's interest in his professional standing conflicted with his duty of loyalty to Appellant. Appellant also contends that CPT MC violated his duty of loyalty by not informing Appellant of these concerns. In the memorandum, CPT MC requested the decertification of Mr. D and asserted that his reputation would suffer from association with Mr. D. The primary substantive issue in the memorandum concerned CPT MC's assertion that Mr. D intended to pursue an unsubstantiated allegation of unlawful command influence. At trial, however, the defense did not raise the issue of unlawful command influence, focusing instead on the merits of the prosecution case. These circumstances indicate that the concerns of CPT MC were resolved prior to trial. The record does not otherwise demonstrate that CPT MC was unsuccessful in properly focusing the efforts of the defense team. Absent evidence demonstrating that he was unable to resolve his initial concerns about Mr. D, CPT MC was not obligated to communicate those initial concerns to Appellant. See Dep't of Army, Military Justice, Army Reg. 27-10 app. C-2 b.(3) (Apr. 27, 2005) (indicating that military counsel is obligated to only inform the client of problems with civilian counsel's tactics only if the problems cannot first be resolved between counsel).

4. CPT MC -- Information about Mr. D

Appellant also notes that CPT MC did not inform him of the concern, raised in CPT MC's letter to the Regional Defense Counsel, that Mr. D's license to practice law previously had been suspended. At the time of trial, however, Mr. D was licensed to practice law. Appellant does not identify a specific obligation on the part of co-counsel to inform a client about a past disciplinary action against the lead counsel who, at the time of trial, was licensed to practice law. Even if CPT MC had been under such an obligation, Appellant has not identified the details of the past disciplinary action against Mr. D. As such, we have nothing more than speculation as to the impact that any such information might have had on Appellant's rights under *Strickland*.

5. Mr. D

Appellant contends that Mr. D faced a conflict between his friendship with Appellant's prior counsel, Mr. HG, and his duty of loyalty to Appellant. In particular, Appellant claims that Mr. D was reluctant to press Mr. HG for files necessary to prepare for trial motions because of their friendship. The record, however, reflects that the documents were turned over to the defense counsel, and that pertinent motions were filed and argued by the defense at trial. Even assuming that there was some delay in obtaining the records, whether as a result of Mr. D's reluctance or for some other reason, Appellant has not demonstrated that any such delay had any effect on the trial proceedings.

III. ISSUES CONCERNING PERFORMANCE OF COUNSEL

Aside from the concerns related to potential conflicts of interest, Appellant alleges a number of deficiencies in the performance of his attorneys. We review these contentions under the *Strickland* test, discussed in Section II.B., *supra*. When we apply *Strickland* to the alleged deficiencies in performance, we ask the following questions:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsels actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy "fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

McConnell, 55 M.J. at 481 (quoting *United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).*

In this appeal, Appellant identifies a number of specific problems with the performance of his counsel. First, Appellant contends that his military counsel were deficient in not bringing to his attention their concerns about the manner in which Mr. D performed his duties as counsel. We have addressed this matter in Section II, *supra.*

Second, Appellant contends that Mr. D was unfamiliar with military practice, which led to difficulties in presenting motions, preserving challenges, compiling witness lists, addressing Military Rule of Evidence 412, providing notice of an alibi defense, obtaining expert witnesses, and participating in sidebar conferences. Appellant's contention consists of a list of alleged deficiencies and he does not detail how these matters relate to the substantive issues at trial.

Third, Appellant contends that defense counsel erroneously opened the door to negative testimony during the cross-examination of PVT D. During the prosecution's case-in-chief, PVT D testified in connection with the rape charge, stating that Appellant often used a fake name. The testimony of PVT D aided the prosecution by corroborating the assertions of Ms. P and Ms. H, who testified that Appellant used a false name during his initial contact with them on the day of the rape. During cross-examination, defense counsel attempted to impeach PVT D by showing that he had a motive to lie so he could avoid prosecution for drug abuse. In response to this line of questioning, the prosecution during redirect examination elicited testimony from PVT D that his cooperation with the Government did not stem from potential drug charges, but because Appellant's former counsel had tried to bribe him. Appellant contends that this negative testimony emerged because defense counsel erroneously opened the door during cross-examination of PVT D about his motives. In addition, Appellant contends that his counsel erred by asking a question which led PVT D to state that one of the false names used by Appellant was "Mike Robinson," which enabled the prosecution to link PVT D's testimony to Ms. P and Ms. H's statements that Appellant had used a similar fake name during his encounters with them.

Fourth, Appellant contends that his counsel failed to exploit inconsistencies between Ms. P's testimony at trial and her pretrial statements. At trial, Ms. P testified that the rape occurred in front of the TV in the living room and that her assailant unbuttoned his pants. Appellant contends that defense counsel could have cast doubt on her testimony by questioning her about pretrial statements in which she said that the rape occurred in the bedroom and that her assailant had unzipped his pants.

Fifth, Appellant contends that his counsel erred by not asking the husband of Ms. P to testify as to her character for untruthfulness. Appellant also asserts that the defense could have more aggressively exploited the husband's testimony that he had an advance view of the photo lineup and discussed it with her before she identified Appellant.

The Government takes the position that the defense team prevailed on a variety of motions, offered an aggressive defense both through cross-examination and direct presentation of witnesses, made reasonable strategic choices regarding the examination of PVT D, Ms. P, and her husband, that any alleged deficiencies involved evidence that was peripheral or cumulative, and that any other deficiencies were not outside the range of performance covered by either the first or second prong of *Strickland*.

The primary evidence against Appellant consisted of the forensic evidence matching his DNA to the sperm extracted from Ms. P during her sexual assault exam. According to the prosecution's expert witness, this match would occur only in 1 in 4,500,000 African-Americans; 1 in 5,300,000 Caucasians; and 1 in 1,900,000 Southwestern Hispanics. In addition, the prosecution connected Appellant to the convenience store robberies through direct testimony and the video surveillance tapes. Appellant has not

dernonstrated that any of the deficiencies raised in this appeal would have altered the powerful import of the DNA and identification evidence in establishing Appellant's guilt. Under these circumstances, we need not determine whether any of the alleged errors established constitutional deficiencies under the first prong of *Strickland*, because any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*.

IV. CONCLUSION

The decision of the United States Army Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES, Appellee

v.

Private First Class
Jacques SAINTAUDE, Jr.
United States Army, Appellant

ARMY 9801647

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Decided October 15, 2003

Before HARVEY, BARTO, and SCHENCK, Appellate Military Judges.

MEMORANDUM OPINION ON FURTHER REVIEW

HARVEY, Senior Judge:

A general court-martial composed of officer members convicted appellant, contrary to his pleas, of rape, robbery (two specifications), adultery, and communication of a threat (three specifications), in violation of Articles 120, 122, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 920, 922, and 934* [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for forty-eight years, forfeiture of all pay and

allowances, and reduction to Private E1. The convening authority credited appellant with 194 days of confinement credit for pretrial confinement served.

On 7 May 2002, this court held that: (1) Specifications 2, 3, and 4 of Charge III (communication of a threat) failed to state an offense; and (2) appellant received ineffective assistance of counsel during the sentencing phase of his trial. *United States v. Saintaude*, 56 M.J. 888, 891, 899 (Army Ct. Crim. App. 2002). We set aside the findings of guilty of Specifications 2, 3, and 4 of Charge III and dismissed Specifications 2, 3, and 4 of Charge III without prejudice. *Id.* at 899. We affirmed the remaining findings of guilty, set aside the sentence, and authorized a sentence rehearing by the same or a different convening authority. *Id.*

On 7-9 October 2002, a court composed of officer and enlisted members held a sentence rehearing and sentenced appellant to a dishonorable discharge, confinement for thirty-five years, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority approved the adjudged sentence, and ordered that appellant be credited with 1,615 days of pre-sentence confinement credit and 196 days of administrative credit for illegal pre-sentence confinement.*

Appellate defense counsel assert that appellant's approved confinement is inappropriately severe and request relief under Article 66(c), UCMJ. We disagree. The matters appellant raised pursuant to *United States v. Grostefon*, 12

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* The military judge determined that, after appellant's second confinement review, the Regional Correctional Facility at Fort Sill arbitrarily retained appellant at a custody level (Segregation Level Two) more rigorous than required. The military judge awarded two days of confinement credit for each day appellant was arbitrarily held in Segregation Level Two, for a total of 196 days of credit, as a remedy for the Article 13, UCMJ, violation. *See* Appellate Exhibit XX.

M.J. 431 (C.M.A. 1982), are without merit.

The sentence is affirmed.

Judge BARTO and Judge SCHENCK concur.

APPENDIX C

UNITED STATES, Appellee

v.

Private First Class
Jacques SAINTAUDE, Jr.
United States Army, Appellant

ARMY 9801647

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Decided May 7, 2002

Before CANNER, CARTER, and HARVEY, Appellate Military Judges. Senior Judges CANNER and JUDGE Carter concur.

OPINION OF THE COURT

HARVEY, Judge:

A general court-martial composed of officer members[1]

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[1] Colonel (COL) K was appointed as a panel member by Court-Martial Convening Order Number 17, dated 20 October 1997, and was viced by Court-Martial Convening Order Number 17, dated 13 November 1998. The record did not explain why COL K was a member in appellant's court-martial after being excused. After participating in *voir dire* with the other members, COL K was not challenged. His presence as a member does not constitute jurisdictional error. *United States v.*

convicted appellant, contrary to his pleas, of rape, robbery (two specifications), adultery, and communication of a threat (three specifications), in violation of Articles 120, 122, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 920, 922, and 934* [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for forty-eight years, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority credited appellant with one hundred and ninety-four days of confinement credit for pretrial confinement served.

In this Article 66, UCMJ, appeal, appellate defense counsel assert eleven assignments of error and one supplemental assignment of error, and appellant raises two issues for our consideration pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).* Government appellate counsel counter that all assigned errors, including *Grostefon* errors, lack merit and urge us to affirm the findings and sentence. We considered the appellate briefs and supplemental briefs submitted, as well as excellent oral arguments by counsel. We find that the three specifications alleging that appellant communicated threats fail to state an offense. Our decision moots appellant's other four assignments of error pertaining to the specifications alleging communication of threats. We conclude that appellant's defense counsel provided ineffective assistance of counsel during the sentencing phase of his trial: (1) for conceding that appellant's pre-service Florida pleas of *nolo contendere* "with adjudication withheld" were civil convictions; and (2) for failing to investigate and present mitigation evidence. We specifically find that appellant's other allegations of ineffective assistance of counsel are without merit. We will order a sentence rehearing in our decretal paragraph.

Herrington, 8 M.J. 194, 195 (C.M.A. 1980).

Failure to State an Offense

In Specifications 2-4 of Charge III, appellant was charged with communicating threats to three different soldiers, in violation of Article 134, UCMJ. Specifications 2-4 of Charge III allege that appellant "did, at or near Colorado Springs, Colorado, on or about 1 June 1998, wrongfully communicate to" Private First Class (PFC) Fleming, Private (PVT) Richardson and Special Agent (SA) Perdue, respectively, "a threat." These specifications lack specific threatening words, any explanation of what the threat was, or a description of whom or what was threatened. The defense counsel did not file a motion for a bill of particulars[2] requesting that the military judge order the government to specify the threatening language communicated to PFC Fleming, PVT Richardson, and SA Perdue. The defense counsel also failed to ask the military judge to dismiss Specifications 2- 4 of Charge III for failure to state an offense.

The *Manual for Courts-Martial, United States* (1998 ed.) [hereinafter MCM, 1998], Part IV, para. 110b, sets forth the elements of communicating a threat as follows:

> (1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

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[2] When a specification is vague or indefinite, a bill of particulars may be used "to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial" and to protect the accused from "another prosecution for the same offense." *United States v. Williams, 40 M.J. 379, 381 n.2 (C.M.A. 1994)* (quoting Rule for Courts-Martial [hereinafter R.C.M.] 906(b) (6) discussion). However, "[a] bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient." *Id.*

(2) That the communication was made known to that person or to a third person;

(3) That the communication was wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Absent from Specifications 2-4 of Charge III is the "certain language expressing" the threat that appellant allegedly uttered or any descriptions concerning whom or what was threatened. Failure to state an offense is a nonwaivable ground for dismissal of a charge. R.C.M. 907(b) (1) (B). "The standard for determining whether a specification states an offense is whether the specification alleges 'every element' of [the offense] 'either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy.'" *United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994)* (quoting R.C.M. 307(c) (3)) (other citation omitted). "This is a three-prong test requiring (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy." *Id.*; *United States v. Bailey, 52 M.J. 786, 795 (A.F. Ct. Crim. App. 1999), aff'd, 55 M.J. 38 (2001).* "Specifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French, 31 M.J. 57, 59 (C.M.A. 1990); see also United States v. Bryant, 30 M.J. 72, 73 (C.M.A. 1990); United States v. Watkins, 21 M.J. 208, 209-10(C.M.A. 1986).*

Recently, the Navy-Marine Corps Court of Criminal Appeals indicated that under Article 134, UCMJ, the language of the threat itself, as alleged in the specification, was critical. *See United States v. Bewsey, 54 M.J. 893, 896 (N.M.Ct.Crim.App. 2001).* The *Bewsey* Court stated:

> In *United States v. Fishwick, 25 C.M.R. 897, 1958 WL 3276 (A.F.B.R. 1958)* the accused was charged with threatening to injure a lieutenant by pointing a pistol at him and saying, "Turn that music off and keep it off, do you understand, do you understand." *Fishwick, 25 C.M.R. at 899.* On appeal, Fishwick argued that the specification failed to allege an offense, and the Air Force Board of Review agreed. The Board noted that one essential element of a threat is that "within its language the accused declared his purpose or intent to do an act which was wrongful." *Id.* (quoting *United States v. Davis, 6 U.S.C.M.A. 34, 19 C.M.R. 160, 1955 WL 3415 (1955)).* In *Fishwick,* the Board of Review found that the language cited above failed to state an offense because "[t]here [was] no oral or written declaration of the intent to injure." *Fishwick, 25 C.M.R. at 899.*

Id.; see also *United States v. Shropshire, 20 U.S.C.M.A. 374, 376, 43 C.M.R. 214, 216 (1971); United States v. Dallman, 34 M.J. 274, 275 (C.M.A. 1992)* (holding that a dereliction of duty specification failed to state an offense because it lacked an allegation that appellant "'had certain duties'" (citation omitted)). *But see United States v. Craft , 44 C.M.R. 664, 666 (A.C.M.R. 1971)* (holding that a specification alleging obstruction of justice by communicating a threat to injure the person that the accused is attempting to influence need not

contain the specific threatening language).

In appellant's case, the government asserts[3] that the absence of the words and symbols, "to wit: ____ ," from the model specification in the MCM, 1998, for communication of a threat indicates that there is no requirement for recitation of the threat itself.[4] The sample specification in the MCM, 1998, for communication of a threat states:

> In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 19__, wrongfully communicate to _____ a threat [to] (injure _____ by _____) (accuse _____ of having committed the offense of _____) (_____).

MCM, 1998, Part IV, para. 110f. The government's

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[3] The government also argues that a fact finder may go beyond the content of the specification and consider the surrounding circumstances of the threat to determine the essential element "that a reasonable person in the recipient's place would perceive the contested statement by appellant to be a threat" to injure presently or in the future. *United States v. Phillips, 42 M.J. 127, 129-30 (1995)* (citing *United States v. Gilluly, 13 U.S.C.M.A. 458, 461, 32 C.M.R. 458, 461 (1963)*) (other citations omitted); *United States v. Cotton, 40 M.J. 93, 95 (C.M.A. 1994); United States v. Wartsbaugh, 21 U.S.C.M.A. 535, 537-38, 45 C.M.R. 309, 311-12 (1972); cf. United States v. Najera, 52 M.J. 247, 249 (2000)* ("all the circumstances of a case can be considered [to determine] whether disrespectful behavior, in violation of Article 89[, UCMJ,] has occurred" (citations omitted)). We are not persuaded by the government's argument because appellant's case is distinguishable from the cited cases. We found no cases where the type of information absent from appellant's communication-of-a-threat specifications was imported after arraignment into the specification.

[4] *Compare* MCM, 1998, Part IV, para. 110f (Threat, communicating) *with* para. 12f (Contempt toward officials), para. 57f (Perjury), para. 89f (Indecent language), *and* para. 109f (Threat or hoax: bomb).

contention is without merit because the word "to" was inadvertently left out of the 1995 and subsequent versions of the MCM.[5] As such, the absence of the word "to" from the model communication-of-a-threat specification does not carry the significance urged by the government. Additionally, the content of the MCM's model specifications does not conclusively establish whether or not a specification states an offense because "[t]he sample specifications provided in subparagraph f of each paragraph . . . are guides. The specifications may be varied in form and content as necessary." MCM, 1998, Part IV discussion.

Applying the three-prong *Dear* test to Specifications 2-4 of Charge III, we find that these three specifications fail to state offenses and cannot be sustained upon review. These specifications do not expressly or impliedly allege essential words of criminality,[6] to wit: "certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently

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[5] The word, "to," was included in the form specification for communication of a threat in the 1951, 1969, and 1984 editions of the MCM, but was not included in the 1995, 1998, and 2000 editions of the MCM. *Compare* MCM, 1951, app. 6c, para. 171, at p. 494; MCM, 1969 (Rev. ed.), app. 6c, para. 181, at A6 -26; *and* MCM, 1984, Part IV, para. 110f *with* MCM (1995, 1998, and 2000 ed.), Part IV, para. 110f. Executive Orders 12550, 19 Feb. 1986; 12586, 3 Mar. 1987; 12708, 23 Mar. 1990; 12767, 27 June 1991; 12888, 23 Dec. 1993; 12936, 10 Nov. 1994; 12960, 12 May 1995; 13086, 27 May 1998; and 13140, 6 Oct. 1999 do not contain any change to the form specification for communication of a threat. *See* MCM, 2000, app. 25, at A25-2 to A25-53. We also note that the first element for communicating a threat in paragraph 3-110-1c (1) of Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (1 Apr. 2001) reads: "That (state the time and place alleged), the accused communicated certain language, to wit: (state the language alleged), or words to that effect."

[6] *French, 31 M.J. at 60.*

or in the future,"[7] and they fail to protect against double jeopardy.[8] We will dismiss these specifications without prejudice in our decretal paragraph.

Pre-Sentence Proceeding
Ineffective Assistance of Counsel

Appellate defense counsel contend in their written submissions, or have asserted during oral argument, that appellant received ineffective assistance of counsel during the sentencing phase of his trial because his defense team failed to: (1) object to trial counsel's leading questions; (2) cross-examine the government's aggravation witnesses; (3) research and properly object to the admissibility of appellant's pre-service Florida *nolo contendere* pleas with adjudication of guilt withheld; (4) investigate and present available mitigation evidence; (5) provide additional assistance to appellant to help him better prepare his unsworn statement; (6) object to improper prosecution argument; and (7) obtain appellant's consent before urging the members to sentence him to twenty-one years confinement.

To establish ineffective assistance of counsel, an appellant must meet a two-pronged test to overcome the strong presumption of competence:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant

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[7] MCM, 1998, Part IV, para. 110b (1).

[8] *Dear, 40 M.J. at 197.*

> must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[9]

The *Strickland* two-part test for ineffective assistance of counsel applies to sentencing hearings.[10] "A defendant who claims ineffective assistance of counsel 'must surmount a very high hurdle.'" *Alves, 53 M.J. at 289* (citations omitted). "Judicial scrutiny of such a claim is highly deferential and should not be colored by the distorting effects of hindsight." *Id.* The burden is on an accused to show "specific errors . . . [which] were unreasonable 'under prevailing professional norms.'" *United States v. Brownfield, 52 M.J. 40, 42 (1999)* (quoting *Strickland, 466 U.S. at 689).*

The Government's Aggravation Evidence Admissibility of Pre -Service Florida *Nolo Contendere* Pleas

During the sentencing phase of appellant's court-martial, the trial counsel offered into evidence, as prior convictions, records of two pre-service pleas of *nolo contendere*, which stated on the face of the documents

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[9] *Williams v. Taylor, 529 U.S. 362, 390 (2000)* (quoting *Strickland v. Washington, 466 U.S. 668, 687 (1984)); United States v. Holt, 33 M.J. 400, 409 (C.M.A. 1991)* (citations omitted); *see also United States v. Grigoruk , 56 M.J. 304, 307 (2002)* (Gierke, J.) (restating the two *Strickland* prongs and adding a third prong stating, "[a]re appellant's allegations true; if so, 'is there a reasonable explanation for counsel's actions?'" (citation omitted)).

[10] *United States v. Alves, 53 M.J. 286, 289 (2000)* (citing *United States v. Ginn, 47 M.J. 236, 246-47 (1997)* and *United States v. Boone, 49 M.J. 187 (1998)*) (other citations omitted); *see also Glover v. United States, 531 U.S. 198, 201-04 (2001).*

admitted into evidence, "adjudication of guilt was withheld, a finding of guilt entered." On 10 May 1993, appellant entered a *nolo contendere* plea for first-degree misdemeanor violations of Florida Statutes for trespass and battery, to wit: Fla. Stat. ch. 810.08(2) (b) and ch. 784.03 (1992). His sentence included a fine, six months' probation, and an order to have no "hostile contact [with the] victim." On 22 October 1993, appellant entered a *nolo contendere* plea for the third-degree felony of attempted possession of cocaine, in violation of Fla. Stat. ch. 777.04 and ch. 893.13(1)(f) (1992). His sentence included a fine and two years' probation. There is no evidence that appellant's probation was vacated for either of these sentences.

Although acknowledging that the *nolo contendere* pleas were, indeed, convictions, appellant's trial defense counsel objected to their admissibility, citing Military Rule of Evidence [hereinafter Mil. R. Evid.] 403. Trial defense counsel asserted that the "remoteness and the nature of the convictions indicate that the probative value of the convictions will be substantially outweighed by the danger of unfair prejudice" because the convictions were approximately five years old, and "occurred prior to PFC Saintaude's enlistment in the military." Applying the balancing test in Mil. R. Evid. 403, the military judge overruled the defense objection and admitted the *nolo contendere* pleas into evidence as prior civilian "convictions."[11]

To resolve appellant's allegations of ineffective assistance of counsel, we ordered affidavits from appellant's military counsel, Captains (CPT) B and C.[12] [13] During

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[11] *See also* R.C.M. 1001(b) (3) (A).

[12] Appellant's civilian defense counsel, Mr. D, died after trial.

appellant's sentencing hearing, CPT C took the lead on behalf of the defense team.[14] Captain B was responsible for the motion to suppress appellant's *nolo contendere* pleas; however, she did not remember researching whether appellant's *nolo contendere* pleas constituted convictions under Florida law. Captain C doubted that this issue was researched. Both military defense counsel acknowledged in affidavits that they failed to recognize that these adjudications might not be "convictions."[15] There is nothing

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[13] We may order and consider post-trial affidavits to assist with resolution of allegations of ineffective assistance of counsel. *See United States v. Lewis, 42 M.J. 1, 11-12 (1995)* (citations omitted).

[14] In her post-trial affidavit, CPT B stated that Mr. D was responsible for the sentencing phase of appellant's trial. However, CPT C "became primary attorney for the sentencing case on very short notice" after findings were announced. Regardless of the assignment of duties and responsibilities within the defense team, "we evaluate the performance of the defense team as a unit for each of appellant's claims" of ineffective assistance of counsel. *United States v. McConnell, 55 M.J. 479, 481 (2001).*

[15] Captain C's post-trial affidavit indicated that it did not occur to him "that a finding of guilt based [on] a *nolo contendere* plea would not count as a conviction." Under Florida law an unadjudicated, finding of guilt based upon a *nolo contendere* plea is not equivalent to a conviction under most circumstances, in contrast to a guilty plea with adjudication withheld or a *nolo contendere* plea with an adjudication of guilt, which are considered to be convictions for substantially more purposes. *Compare United States v. Drayton, 113 F.3d 1191, 1193 (11th Cir. 1997)* (per curiam) (holding that a Florida *nolo contendere* plea with an adjudication of guilt constitutes a conviction); *United States v. Grinkiewicz, 873 F.2d 253, 255 (11th Cir. 1989)* and *United States v. Cook , 10 M.J. 138, 139 (C.M.A. 1981)* (both holding that a Florida guilty plea with adjudication of guilt withheld constitutes a conviction); *and McCrae v. State, 395 So. 2d 1145, 1153-54 (Fla. 1980)* (holding that for capital sentencing purposes, a plea of guilty without an adjudication of guilt may be used as a "conviction") *with Negron v. State, 799 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 2001) and Lawrence v. State, 785 So. 2d 728, 730 (Fla. Dist. Ct. App. 2001).*

in the record indicating that trial counsel was aware of this issue either.

Rule for Courts-Martial 1001(b) (3) authorizes the introduction of civilian convictions during sentencing. Admissibility of prior convictions is subject to Mil. R. Evid. 403, which states that relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." *See United States v. Clemente, 50 M.J. 36, 37 (1999)* (citation omitted). Whether a prior civilian adjudication of an offense under a *nol pros* arrangement, a *nolo contendere* plea, or involving a juvenile, deferred, or withheld adjudication, or some other expungement scheme constitutes a prior "civilian conviction" during the sentencing phase of a court-martial under R.C.M. 1001(b)(3)[16] can be a difficult question to answer. This is because at the time of appellant's trial the state law of the jurisdiction in which the adjudication occurred determined whether appellant's civilian adjudication was a conviction, and state law may be unsettled and can frequently change.[17] "The laws of the various states do not always label proceedings in a manner that readily identifies the result as a 'conviction' for purposes of R.C.M. 1001(b) (3)." *United States v. White, 47 M.J. 139, 140 (1997).*[18]

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[16] On April 11, 2002, the President amended R.C.M. 1001(b) (3) (A) and ended the requirement that admissibility of convictions during sentencing be dependent on the law of the jurisdiction where the adjudication originated, permitting trial counsel to introduce *nolo contendere* pleas such as appellant's as civilian convictions during sentencing, provided arraignment has been completed on or after May 15, 2002. 2002 Amendments to the MCM.

[17] *See* MCM, 1998, app. 21, R.C.M. 1001(b) (3) analysis, at A21-67-68 ("Whether the adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction.").

[18] For example, in *United States v. Hughes, 26 M.J. 119, 120 (C.M.A.*

It is unclear, and thus not plain error,[19] whether a Florida plea of *nolo contendere* with adjudication of guilt withheld, but a finding of guilt entered, constitutes a

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1988), our superior court found that under Texas law an "Order Deferring Adjudication" was not a "conviction" and inadmissible under R.C.M. 1001 (b)(3)(A), even though it was admissible for sentencing purposes in certain Texas trials. In *United States v. Slovacek, 24 M.J. 140 (C.M.A. 1987)*, our superior court "held that juvenile records do not amount to an admissible conviction; but to do so, [they] relied upon the distinction in Mil. R. Evid. 609(d), Manual, *supra*, 'between a conviction and a juvenile adjudication,' precisely because RCM 1001(b) (3) (A) was not conclusive." *White, 47 M.J. at 140.*

[19] We agree with the analysis of the Eleventh Circuit, in *United States v. Chubbuck, 252 F.3d 1300, 1306 (11th Cir. 2001)*, that it was not plain error for the court to consider Chubbuck's plea of guilty with adjudication withheld as a predicate conviction under *18 U.S.C. § 921*(a) (20) because of the lack of definitive authority on whether "a guilty plea with adjudication withheld constitutes a conviction under Florida law." In *Chubbuck*, the court also noted:

> There appears to be a common perception among persons involved in the Florida criminal justice system that a defendant, for whom adjudication is withheld, has not been "convicted" under Florida law. Probation officers of this court, having served as Florida probation officers before joining the federal system, have confirmed that defendants in Florida are routinely advised by practicing criminal defense lawyers, by state probation officers, by state prosecutors, and by judges, that when adjudication is withheld, they are not "convicted" and accordingly do not lose their civil rights.

Id. at 1305 (quoting *Thompson, 756 F.Supp. at 1496)* (other citation omitted). Similarly, we conclude that admission of appellant's pre-service *nolo contendere* pleas was error, but not plain error. Their admission was not a "clear or obvious" error under applicable Florida law at the time of appellant's trial. *See United States v. Ruiz, 54 M.J. 138, 143 (2000); United States v. Southwick, 53 M.J. 412, 414 (2000); United States v. Powell, 49 M.J. 460, 465 (1998).*

conviction for purposes of R.C.M. 1001(b)(3)(A). "The term 'conviction' as used in Florida law has been a 'chameleon-like' term that has drawn its meaning from the particular statutory context in which the term is used."[20]

We find Eleventh Circuit analysis to be persuasive, which has held that a *nolo contendere* plea without an adjudication of guilt, and with successful completion of probation, is not a predicate conviction under the Federal Firearms statute.[21] [22] In reaching this determination, the district court in *Thompson* applied Florida case law from the Florida statute most analogous to the Federal Firearms statute, that is Fla. Stat. ch. 790.23 (1989), a statute that prohibits possession of a firearm by felons. *Thompson, 756 F.Supp at 1493.* However, the *Thompson* court noted that ch. 790.23 "offers little help because it provides no definition

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[20] *Raulerson v. State, 763 So. 2d 285, 291 (Fla. 2000)* (per curiam) (citation omitted); *State v. Keirn, 720 So. 2d 1085, 1088 (Fla. Dist. Ct. App. 1998)* ("the term 'conviction' requires a close examination of its statutory context and legislative history and development").

[21] The Federal Firearms Statute, *18 U.S.C. § 922*(g)(1) (2002), prohibits any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition . . . ." "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *18 U.S.C. § 921*(a) (20) (B) (2002).

[22] *United States v. Willis, 106 F.3d 966, 968-70 (11th Cir. 1997); United States v. Thompson, 756 F.Supp. 1492, 1497 (N.D. Fla. 1991); see also Garron v. State, 528 So. 2d 353, 360 (Fla. 1988)* (holding that a *nolo contendere* plea with adjudication withheld is not a "conviction" for capital sentencing proceedings); *State v. McFadden, 772 So. 2d 1209, 1216 (Fla. 2000)* (holding that "unless there is a final judgment of conviction or an adjudication of guilt, the defendant or witness may not be impeached with evidence of a guilty plea or jury verdict" under Fla. Stat. ch. 90.610(1)(1997)).

for the terms 'convicted' or 'conviction'." *Id.*

We look to the Florida Statute most analogous to R.C.M. 1001(b) (3) to provide the most relevant definition of "conviction" applicable to appellant's case. Florida Rule of Criminal Procedure [hereinafter Fla. R. Crim. P.] § 3.702 (d) (2) (2001) defines "conviction" as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." "Because a plea of no contest with an adjudication of guilt withheld and with probation successfully completed does not entail a 'determination of guilt,' such offenses should not be included as a 'prior record' under the sentencing guidelines." *Negron, 799 So. 2d at 1127; Lawrence, 785 So. 2d at 730* (both citing *Garron v. State, 528 So. 2d 353 (Fla. 1988)).* We conclude that appellant's *nolo contendere* pleas with adjudication of guilt withheld are inadmissible under R.C.M. 1001(b) (3) because they would be inadmissible during sentencing if appellant was convicted in Florida of rape and robbery. *See* Fla. Stat. ch. 921.0011(2) (2001); Fla. R. Crim. P. 3.701(d) (2) (2001).[23]

We find that appellant's trial defense team provided ineffective assistance of counsel by failing to research whether appellant's *nolo contendere* pleas constituted convictions under Florida law. This error was aggravated by the trial defense counsel's concession to the military judge

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[23] We choose not to apply the definition of "conviction" in Fla. Stat. ch. 775.13(1) (2001), which states that "convicted" means, as to registration of convicted felons, "a determination of guilt which is the result of . . . a plea of guilty or *nolo contendere*, regardless of whether adjudication is withheld" because this use of a *nolo contendere* plea is dissimilar to its use in a sentencing proceeding. *See also Keirn, 720 So. 2d at 1085-91* (discussing in detail the "statutory context" for the term "conviction" without adjudication as it pertains to driving with a suspended license).

that the *nolo contendere* pleas constituted convictions.

Aggravation Witnesses

Appellate defense counsel contend that appellant received ineffective assistance of counsel because trial defense counsel failed to object to the trial counsel's leading questions and failed to cross-examine the government's aggravation witnesses. None of the government's three aggravation witnesses, PFC Fleming, Ms. N, and Ms. P, were cross-examined by appellant's defense counsel. Defense counsel lodged only a single objection, asserting a lack of relevance, to one of the trial counsel's questions.

Private First Class Fleming testified that appellant's threat frightened him and his fiancée, who moved from Colorado to Arizona out of concern over appellant's threat. Confinement officials moved PFC Fleming to civilian confinement separate from appellant so that he would be safe. Ms. N, an employee of one of the two 7-Elevens robbed by appellant, testified that she was terrified because appellant said to her, "I'm going to kill that bitch," seven times over the course of the robbery. Ms. N thought appellant had a gun during the robbery because he had his hand in his coat. Thoughts of the robbery continually intruded into Ms. N's life. She moved her family because she no longer wanted to live near the scene of the robbery.

Ms. P, the victim of the rape, testified that while appellant was raping her, she was thinking about herself and her baby. After the rape Ms. P was afraid to be alone and she lacked trust in others. Her post-rape medical examination was embarrassing and painful. Ms. P had difficulty describing the rape for the doctors, police, and attorneys in pretrial interviews and in court. The rape had a negative impact on her marriage. The rape caused Ms. P to

suffer weight- loss and to be unable to sleep. She was also unable to nurse her baby because the stress of the rape caused her to lose her milk.

Appellate defense counsel argue that trial defense counsel failed to object to leading questions, and that appellant was prejudiced by his counsel's failure to cross-examine Ms. P about her claims of embarrassment, weight-loss, and failed marriage as a result of the rape. Appellate defense counsel also assert that appellant's trial defense counsel failed to use a videotaped interview of Ms. P made five days after the rape for impeachment. On the videotape, Ms. P seems comfortable talking about the rape[24] and was already quite thin.[25] Finally, appellate defense counsel refer to Ms. P's medical records, which indicated that even before the rape she was taking medication to induce breast milk.

Most of the information that appellate defense counsel contend would have impeached Ms. P's testimony was already presented to the members during the merits phase of the trial. A clinical social worker, who provided counseling for Ms. P after the rape, testified that, at first, Ms. P said that her sexual relationship with her husband was only affected for two weeks after the rape, but later she indicated differently. Neither Ms. P nor her husband testified about why they were getting divorced, but at appellant's trial they

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[24] Ms. P's positive demeanor five days after the rape, as depicted on the videotaped interview, was cumulative with other information presented to the members on the merits. Ms. P and her husband testified that she showed a positive demeanor the evening after the rape. The clinical social worker explained to the members that it was not unusual for a person to seem happy after a traumatic event.

[25] There is also a possibility that Ms. P's physical appearance was affected by her car accident, which occurred several months before she testified at appellant's trial.

were engaged in a nasty custody battle. The clinical social worker said that Ms. P, who was seventeen years old at the time of the rape, suffered from post-traumatic stress disorder, and experienced nightmares, significant weight loss,[26] and an inability to nurse her baby after the rape.[27] The Sexual Assault Nurse Examiner who examined Ms. P at the hospital the day after the rape testified that she conducted a pelvic examination, swabbed Ms. P's vagina and cervix for evidentiary purposes, and observed vaginal trauma and bleeding from rough sexual intercourse.

Under these circumstances, additional aggressive cross-examination and impeachment of Ms. P during the sentencing phase, after her lengthy cross examination on the merits, would not have substantially benefited appellant. The trial defense counsel may also have reasonably decided as a tactical matter that such cross-examination would be counter-productive. *See United States v. Ingham, 42 M.J. 218, 228 (1995)* (recognizing that a valid tactical reason for limited cross-examination is "wider cross-examination of [the witness] may have merely solidified the position of the government"). Appellate defense counsel failed to establish that trial defense counsel's performance during the government's presentation of aggravation evidence was deficient, nor has appellate defense counsel established that trial defense counsel's errors prejudiced the defense to the extent that they deprived appellant of his right to a fair trial. *See Williams, 529 U.S. at 390.*

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[26] The clinical social worker's notes state that Ms. P lost 10 pounds due to stress after the rape and that she weighed 94 pounds three months after the rape. Ms. P's weight prior to the rape and at trial is not part of the record. The defense has failed to establish that Ms. P lied about stress from the rape causing her to lose weight.

[27] Appellant has failed to provide conclusive evidence that the rape did not cause Ms. P to lose her ability to provide breast milk for her baby.

The Defense's Extenuation and Mitigation Presentation

Appellate defense counsel allege two prejudicial errors by the defense team during the presentation of extenuation and mitigation evidence: (1) the defense team failed to provide additional assistance to appellant to help him prepare a better unsworn statement; and (2) the defense team failed to investigate and present available mitigation evidence.

As the sentencing hearing began, appellant and his mother had not come to terms with the findings of the court-martial,[28] and this inhibited the presentation of defense extenuation and mitigation evidence. The defense read to the court members a stipulation of expected testimony of appellant's mother:

> Jacques Saintaude is my youngest child. His father and I divorced when Jacques was 10 years old. I remarried when he was 13. I have not seen my son since the Army sent him to Fort Carson. We talked almost weekly. Jacques has two older sisters, Naomi and Jacqueline. Jacques' older half-brother was murdered when Jacques was in high school. Jacques has two children.[29] Jacquis, his son, is

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[28] During the government's case in aggravation, appellant's mother entered the courtroom and began screaming and crying, "My son, my son. I want my son." The military judge recessed the trial for forty-four minutes. After the trial resumed, the military judge warned the defense that appellant's mother would be escorted out of the trial if she made another outburst. The military judge also told appellant that he knew appellant was upset about the findings, and that he would consider shackling appellant or excluding him from the proceedings if he became disruptive.

[29] Appellant's statement submitted under R.C.M. 1105 indicates he has three children.

> five years old. Jaleesa, his daughter, was born this past Father's day, June 21, 1998.

Appellant did not testify on the merits. The best opportunity the members had to directly assess appellant was during his unsworn statement, at which time he stated:

> I would like to thank the members of this court for viewing this case based on the evidence that was presented to you. However, I truly believe that - - I truly believe there are [sic] a God, and I truly believe that God is over everything. However, your decision was based on the evidence that we were allowed to present it [sic] to you. But I pray that God will bless each one of y'all, and I pray that the truth will come out to [sic] this matter. Thank you. That's all.

Appellate defense counsel argue that his trial defense counsel failed to adequately prepare appellant for his unsworn statement, but they do not to support this argument with any evidence. We have no description of what appellant would have said during his unsworn statement if he had been better prepared. Accordingly, appellate defense counsel have failed to meet their burden of establishing ineffective assistance of counsel with respect to preparing appellant for his unsworn statement.

The members received a copy of appellant's Personnel Qualification Record prior to sentencing deliberations, which indicated that appellant is a high school graduate, had a general technical score of 94, was twenty- four years' old when his sentence was announced, and had a military occupational specialty of medical supply specialist. Appellant was on active duty nineteen months prior to being

placed into pretrial confinement, and was awarded the Army Service Ribbon and Army Achievement Medal (AAM). His military records lacked any additional description of his duties or performance evaluations.

After trial, appellant procured the assistance of a new civilian defense counsel, who submitted thirteen letters to the convening authority pursuant to R.C.M. 1105. These letters were from appellant, family, friends, clergy, and a noncommissioned officer, who was appellant's primary instructor and counselor during Advanced Individual Training (AIT). The letters state that before appellant joined the Army, he was a promising student who overcame the odds as an immigrant, provided meals for the homeless, and participated in a tutorial program. He was employed as a team leader at a steakhouse. A letter from a staff sergeant indicates that during AIT appellant was an exemplary soldier, who demonstrated an impressive degree of professionalism. In his letter, appellant said that he received his AAM for being the "best[,] hard[-]working soldier in my section" and for completing two hundred hours of correspondence courses. Appellant's wife, who was present at appellant's trial, wrote that she expected to and was ready, willing and able to testify on appellant's behalf. The mothers of appellant's other children asked for mercy for appellant. The letters urge clemency and state that appellant was enthusiastic about his military service, shared a close bond with his mother, and was a good father to his children.

In response to our order that CPTs B and C describe the defense efforts to investigate appellant's pre-service background for mitigation evidence, CPT C said that he attempted to telephone appellant's mother on several occasions without success. Captain C also stated, "Neither the appellant nor Mr. D would acknowledge the possibility that the appellant would be convicted and therefore refused

to cooperate with our efforts to prepare for sentencing."[30] Neither CPT B nor CPT C indicated that anyone on the defense team investigated appellant's background beyond the preparation of his mother's stipulation of expected testimony, and beyond discussion of the impact of various confinement options with appellant. Also, they did not interview any of the persons who provided the letters that were included in the R.C.M. 1105 submissions to the convening authority. Captains B and C did not assert any tactical reason or otherwise explain their lack of effort on appellant's behalf.[31]

Under the circumstances of this case, appellant's defense team erred during the sentencing phase by their failure to investigate appellant's background for potential mitigation evidence and, thereafter, by their failure to present available mitigation evidence. *See Alves, 53 M.J. at 289* ("'Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" (quoting *Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)).* "It should not require an attorney of extreme competence or vast experience to realize that when representing [a soldier] who is facing life

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[30] The relationship between CPT C and Mr. D became so strained that in the midst of trial preparation, CPT C wrote his Regional Defense Counsel requesting that Mr. D be barred from court-martial practice for incompetence.

[31] *See, e.g., United States v. Morgan, 37 M.J. 407, 409-10 (C.M.A. 1993)* (holding that a failure to thoroughly investigate or to present potential insanity defense or evidence of appellant's personality disorder in mitigation was tactical decision and not ineffective assistance of counsel); *United States v. Stephenson, 33 M.J. 79, 82 (C.M.A. 1991)* (holding that a tactical concern about cross-examination of mitigation witnesses concerning derogatory information pertaining to appellant justified defense counsel's failure to present mitigation testimony during sentencing).

in prison. . . some extra effort may be necessary to prepare a credible case in extenuation and mitigation."[32]

Closing Arguments on Sentencing[33]

Appellate defense counsel assert that trial defense counsel's sentencing argument was improper. Appellant's trial defense counsel countered trial counsel's argument for confinement for life without eligibility for parole by stating that an appropriate sentence included twenty-one years of confinement. Trial defense counsel further urged the members not to split the difference between the government and the defense proposals. Appellant's trial defense counsel also argued that because appellant was only twenty-four years old and had a statistical life expectancy of forty-nine years,[34] it would be unfair to confine him for the next forty-

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[32] *United States v. Dorsey, 30 M.J. 1156, 1160-61 (A.C.M.R. 1990)* (holding that a failure to present meaningful pre-sentencing evidence in response to the government's damaging character evidence was ineffective assistance); *see also Boone, 49 M.J. at 196 n. 10* (citations omitted); *Holt, 33 M.J. at 411-12* (holding that a failure to call witnesses or the accused, to register objections, or to cross-examine government witnesses at sentencing was ineffective assistance); *United States v. Sadler, 16 M.J. 982, 982-84 (A.C.M.R. 1983)* (holding that a failure to present any evidence in extenuation or mitigation or any statement from appellant, and failure to argue for an appropriate sentence was ineffective assistance); *cf. United States v. Harris, 34 M.J. 297, 300-02 (C.M.A. 1992)* (holding that a failure to obtain and introduce character evidence on the merits raised a "substantial question" of effectiveness of counsel and required a remand for reconsideration), *remanded to 36 M.J. 936 (A.C.M.R. 1993)*.

[33] We disagree with and decline to discuss appellate defense counsel's contention that appellant's trial defense counsel were ineffective for failing to object to trial counsel's argument.

[34] No evidence was presented to support the contention that appellant's life expectancy was forty-nine years.

nine years. The members adjudged forty-eight years of confinement.

In a post-trial affidavit, appellant states that he did not consent to his trial defense counsel's argument for twenty-one years' confinement. Appellant asserts that his military trial defense counsel attempted to convince him that he should concede in his unsworn statement that he should be confined for approximately ten years because statistics established that he would be less of a threat to society. Appellant refused to make such a statement. His military trial defense counsels' affidavits counter that appellant consented to the strategy of arguing for a term of years because it would permit earlier consideration for parole than the possible sentence of confinement for life or confinement for life without parole.

"Effective advocacy requires an astute, reflective evaluation of a set of circumstances with rational, tactical trial choices flowing therefrom." *United States v. Burt, 56 M.J. 261, 265 (2002).* We call upon defense counsel "to determine the odds of what might happen as to the findings or sentence and to structure their arguments based on these probabilities." *United States v. Bolkan, 55 M.J. 425, 428 (2001)* (citing *United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994)).* We conclude from our superior court's decisions regarding defense counsel's argument for a punitive discharge,[35] that it would have been prudent for

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[35] Recently, in discussing whether it was appropriate for defense counsel to argue for a punitive discharge in lieu of confinement, our superior court noted, "to be an effective advocate, trial defense counsel is required to discuss with an accused the various components of a military sentence, i.e., confinement, discharge, reduction in rank, and forfeitures, and after such counseling and in accordance with his client's wishes, zealously represent his or her client." *Burt, 56 M.J. at 264* (citing *United States v. Pineda, 54 M.J. 298 (2001)); cf. New York v. Hill, 528 U.S. 110, 114-15 (2000)* (client bound by counsel's tactical decisions, except on the most

defense counsel and the military judge[36] to ensure that appellant concurred with his defense counsel's argument for twenty-one years of confinement,[37] given that twenty-one years is an unusually lengthy recommendation. Because we

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fundamental of choices). "A realistic assessment of possible outcomes is good lawyering. However, a fundamental representational choice, such as a decision whether to seek to stay in the service or passively accept a punitive discharge, is for the client to make." *Bolkan, 55 M.J. at 429* (Baker, J., concurring); *see also United States v. Weatherford, 19 U.S.C.M.A. 424, 425-26, 42 C.M.R. 26, 27-28 (1970).* Counsel may not "'ask a court- martial to impose a punitive discharge when the accused's wishes are to the contrary.'" *Pineda, 54 M.J. at 301* (quoting *United States v. Dresen, 40 M.J. 462, 465 (C.M.A. 1994)).* Indeed, it is error for defense counsel to concede the appropriateness of a punitive discharge without any indication on the record that appellant desired such an outcome. *Id.*

[36] No statute, rule, or military case requires a statement from an accused on the record that he concurs with defense counsel's argument for a specific period of confinement, and we do not require one in this decision.

[37] *See also* Army Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers Rule 1.2(a) (1 May 1992), which provides:

> A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which these decisions are to be pursued. . . . In a criminal case, . . . the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the choice of counsel as provided by law, a plea to be entered, selection of trial forum, whether to enter into a pretrial agreement, and whether the client will testify.

See also Jones v. Barnes, 463 U.S. 745, 753 (1983) (quoting Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982)). "With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Id.*

are returning appellant's case for a sentence rehearing, we need not decide whether appellant was prejudiced by the sentencing arguments of his trial defense counsel.

Assessment of Prejudice and Conclusion

Having considered the totality of circumstances, we are convinced that appellant was prejudiced[38] during the sentencing phase of his trial by the improper admission of his pleas of *nolo contendere*[39] and by his defense counsel's failure to investigate and present an adequate mitigation case. "Normally, ineffective assistance of counsel at the sentencing phase [due to a failure to present an adequate mitigation case] is prejudicial and requires a new sentencing hearing because the record does not contain the evidence that an effective counsel would have presented." *Alves, 53 M.J. at 290* (citing *Boone, 49 M.J. at 198).* We lack confidence that we have sufficient information to reassess the sentence without resorting to a rehearing. *Id.* We cannot reliably affirm "only so much of the sentence as 'would have been imposed at the original trial absent the errors.'" *United States v. Eversole, 53 M.J. 132, 133 (2000)* (quoting *United States v. Taylor, 47 M.J. 322, 325 (1997)).*

We find the remaining assignments of error to be without merit. We also find that the matters personally

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[38] Appellant was prejudiced to a much lesser degree by his conviction of the three communication-of-a-threat specifications. *See United States v. Murray, 43 M.J. 507, 517 (A.F. Ct. Crim. App. 1995)* (discussing prejudicial impact of appellate dismissal of a communication-of-a-threat specification).

[39] We note that trial counsel argued on sentencing, "This is not the first time the accused has committed crimes. He was previously convicted of trespass, cocaine possession, and battery before he even got into the military." The military judge included the two prior "convictions" in his summary of the aggravating evidence during sentencing instructions.

raised by the appellant pursuant to *Grostefon, 12 M.J. at 436-37*, to be meritless.

The findings of guilty of Specifications 2, 3, and 4 of Charge III are set aside and Specifications 2, 3, and 4 of Charge III are dismissed without prejudice. The remaining findings of guilty are affirmed. The sentence is set aside. The same or a different convening authority may order a rehearing on the sentence.

Senior Judge CANNER and Judge CARTER concur.

APPENDIX D*

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE, REGION II
FORT LEAVENWORTH FIELD OFFICE
FORT LEAVENWORTH, KS 66027

REPLY TO
ATTENTION OF:

ATZL-SJA-TD (27-10) 5 October 1998

MEMORANDUM THRU LTC Condron, RDC, Region III, USATDS

FOR Record

SUBJECT: U.S. v. Saintaude

1. Request guidance concerning the continued participation by military defense counsel in the representation of PFC Saintaude. I request that Mr. Dickinson be decertified to practice at courts-martial or that military defense counsel be allowed to withdraw from the case.

2. I believe that Mr. "Mac" Dickinson, the civilian defense counsel currently representing the accused is incompetent and intends to represent the accused in a manner that is ineffective and unprofessional. I have repeatedly attempted to persuade Mr. Dickinson to focus on the relevant aspects of the case. Despite my efforts, I believe he intends to pursue a course of action that is detrimental to the client's interests. I also believe that Mr. Dickinson has a conflict of interest that

* Portions of the original document submitted to the Army Court of Criminal Appeals were redacted. This Appendix reflects the redacted version considered by the lower courts.

inhibits his ability to represent the accused.

3. The following is a short summary of the relevant facts of the case:

a. PFC Saintaude is accused of communicating three separate threats, the armed robbery of two 7-11 stores in Colorado Springs, CO, and the forcible rape of a co-worker's spouse. CPT Bleam, TDC, and Henry Gotten and Patricia Cook, civilian attorneys (who happen to be engaged to each other) originally represented the accused.

b. In early August 1998, PFC Druilhet, a government witness, alleged that Mr. Gotten tried to bribe him in order to get him to change his testimony. CID investigated the allegation and during a monitored phone call between PFC Druilhet and Mr. Gotten, Mr. Gotten admitted offering money, but said it was only offered for truthful testimony. CID attempted to have PFC Druilhet arrange to meet Mr. Gotten in person so their conversations about the alleged bribe could be recorded, however, Mr. Gotten repeatedly canceled the meeting and CID concluded that he was aware of the investigation and gave up. Based upon CID's investigation of Mr. Gotten, trial counsel filed a motion to disqualify Mr. Gotten from participating in the case. Thereafter, Mr. Gotten and Ms. Cook requested and were allowed to withdraw from the case with the accused's consent. Shortly thereafter, PFC Saintaude retained Mr. Dickinson, from Memphis, TN.

c. I first met with Mr. Gotten and Ms. Cook the day before the hearing to release them from the case. They are very zealous, very young and have no prior court-martial or military experience. They explained their belief that the accused is innocent and that the allegations against him are part of an elaborate military conspiracy to frame the accused.

They specifically alleged that the accused's entire chain-of-command, CID, trial counsel and CPT Bleam are part of the conspiracy. They also claimed that they, along with their investigators, had been followed and had received threatening phone calls telling them to get off the case. Additionally, they asserted that the allegations against Mr. Gotten were false and that the allegations were part of the larger conspiracy against the accused. They had absolutely no evidence to substantiate any of their allegations.

d. During my meetings with Mr. Gotten and Ms. Cook, they asserted that CPT Bleam had revealed defense secrets to trial counsel. This assertion was based upon problems they had interviewing witnesses. Specifically, CPT Bleam had scheduled witness interviews for them but then the witnesses allegedly did not show up for the interviews. When the witnesses were later interviewed, they allegedly stated that they had missed the prior meetings because the trial counsel was interviewing them. When asked what was covered during the trial counsel's interviews, it was the same subjects Mr. Gotten and Ms. Cook intended to address. Mr. Gotten and Ms. Cook did not believe this to be coincidence and believed CPT Bleam to be sharing secrets with trial counsel because they are friends. Once again, Mr. Gotten and Ms. Cook did not have any evidence to substantiate their allegations but they could not be dissuaded from their belief. The accused accepted their allegations and indicated to me his desire to fire CPT Bleam. Therefore, on his behalf, I informed the military judge that the accused did not want to be represented by CPT Bleam. The military judge denied the accused's request to release CPT Bleam.

e. I first met Mr. Dickinson an hour before the hearing to release Mr. Gotten and Ms. Cook from the case. At the time, the accused was considering retaining Mr.

Dickinson, but had not come up with the money to do so. My initial meeting with Mr. Dickinson was confrontational in part, because he does not appear to understand the relevant law. For example, he immediately accepted Mr. Gotten and Ms. Cook's assertion that the entire case was infected with unlawful command influence (producing a copy of the unlawful command influence outline from the military judges' course). He further stated that the trial counsel's motion concerning the misconduct by Mr. Gotten was unlawful command influence designed to subvert the accused's Sixth Amendment right to counsel. He believes that it was unethical for the trial counsel to make the motion based upon the evidence and even if the allegation was true, the current state of the law suggests that the offer of money for truthful testimony is not illegal. I have repeatedly told Mr. Dickinson that I do not agree with his assessment of the trial counsel's conduct.

f. Upon my return to Fort Leavenworth the following Monday morning, I had a message from Mr. Dickinson. Mr. Dickinson said that he had been retained. He also stated that SGT Harris, from AWOL apprehension at Fort Carson (they transport pretrial confines between post and the jail), had threatened the accused's life because he had retained Mr. Dickinson. Specifically, SGT Harris told the accused he would be shot while attempting to "escape". Mr. Dickinson further stated that the accused told him that I had taken away his recreation time to "give him an opportunity to think about his choice of counsel." I was already uncomfortable with Mr. Dickinson and the message troubled me, so I called the public defender's office in Memphis, TN to get a reference on Mr. Dickinson. Specifically, I wanted to know if Mr. Dickinson was incompetent or if his unfamiliarity with the military and the military justice system were unduly affecting him. The public defender I spoke with (I forgot his name) was very blunt. He said, "I would not let Mac

Dickinson walk my dog." He said Mr. Dickinson doesn't know Tennessee law and he's sure he doesn't know military law. He said Mr. Dickinson had been disbarred and recently reinstated. He was unsure of the reason for the disbarring action but it may have been related to alcoholism. He also knew Mr. Gotten and said that he used to work for Mr. Dickinson.

g. I returned Mr. Dickinson's call after speaking with the public defender. I told him I had not discussed recreation time with the accused and that I wouldn't have any control over it. I further told him I did not believe SGT Harris threatened the accused's life. In a later conversation, Mr. Dickinson resolved the "recreation time issue" with the accused who said I did not take away his recreation time but he stood by his claim that SGT Harris threatened to kill him. Mr. Dickinson then informed the trial counsel of the threat "in order to protect the accused's life." According to Mr. Dickinson, the next day, a caller identifying himself as SGT Harris left the investigators a threatening message telling them if they came onto Fort Carson, they would not leave post alive. Using the "*69" telephone function, the investigators traced the call to a shoppette on Fort Carson.

h. Mr. Dickinson has informed me of other alleged incidents of intimidation and interference. On numerous occasions, the investigators have allegedly received threatening phone calls, been followed and had unidentified black males try to gain unauthorized entry into their home. They have also received telephone calls from people who clearly know what leads are being investigated. The caller(s) has had such specific information they either attended defense meetings or were ease dropping. The most notable example concerns the investigators' search for a drug dealer's house in Colorado Springs. The address had been given to the investigators by the accused. They were unable

to find the address and then they received an anonymous telephone call explaining that the address was in Orlando, not Colorado Springs. The investigators were able to locate the address based upon the anonymous lead. As it turned out, the address is the accused's home address. Only the accused, Mr. Gotten, Ms. Cook, and the investigators knew they were looking for the address. CPT Bleam did not know about this lead because Mr. Gotten and Ms. Cook would not allow her to participate in the case.

i. After he was retained, Mr. Dickinson and I established that he was lead counsel and that he would speak for the defense. Of particular concern to me was our response to a prosecution motion to compel. I had promised the court that I would respond by the following Friday as long as Mr. Gotten and Ms. Cook turned their files over to me. The court conditioned the release of Mr. Gotten and Ms. Cook from the case upon their assurance that they would provide their files to me. Since Mr. Dickinson had been retained the weekend after the hearing we agreed that the files should be sent to him and that he would respond. I further memorialized that agreement in a memorandum that I faxed to Mr. Dickinson. On the Monday after the response was due, I learned he had not responded as promised. When I called him about the matter he claimed not to realize that the response was due. He further said that he had not received Mr. Gotten and Ms. Cook's files and expected to get the files that Wednesday. In the same conversation or a subsequent conversation, he said that Mr. Gotten and Ms. Cook were also unaware of the Friday deadline. Their claims of ignorance concerning the deadline are not credible. Mr. Gotten and Ms. Cook were seated with me at counsel's table when I made the promise to the court and Mr. Dickinson was in the back of the courtroom.

j. On Friday, 2 October 1998, I met with Mr. Dickinson and the two civilian investigators that were originally hired by Mr. Gotten and Ms. Cook. I was pleasantly surprised with the civilian investigators. Unlike the civilian attorneys, they exhibited common sense and an understanding of the military culture. As it turns out, they are dependents and the lead investigator's son is an Air Force physician. They convinced me that the allegations concerning the threatening phone calls and being followed are true. * * *

k. Also on Friday, 2 October 1998, Mr. Dickinson, CPT Bleam and I discussed motions and requests for expert assistance. I have repeatedly explained to Mr. Dickinson the procedure for obtaining expert assistance, as has CPT Bleam. However, each time the subject is brought up, he fails to acknowledge the necessary steps that need to be taken to secure expert assistance. I have repeatedly offered to prepare the proper requests if he gives me the relevant information on the experts, but he declines the offer. He also asked CPT Bleam if he could get copies of the Article 32 tapes. I had previously asked Mr. Gotten and Ms. Cook for the tapes and understood that they would provide them to me. On this occasion, Mr. Dickinson stated that Mr. Gotten and Ms. Cook told him they did not have the tapes. CPT Bleam responded that she had personally given them to Mr. Gotten and Ms. Cook, but that she would attempt to get copies made.

l. This morning I received a telephone call from Mr. Dickinson. He restated his belief to me that there was a large conspiracy working against the accused. He stated his belief that the conspirators come from the accused's chain-of-command, including his platoon sergeant, first sergeant and former company commander. He demands that we obtain CID's files on all these individuals and refuses to believe

that CID is not investigating them. He also asked me to copy all my files and send them to him, claiming he has nothing and further stating that he does not have Mr. Gotten and Ms. Cook's files, stating they have retained civilian counsel at twice the amount of their retainer on the case. He also stated that the 32 tapes that were given to Mr. Gotten were blank, contrary to his previous assertion that they did not have them.

* * *

5. Mr. Dickinson does not have a competent defense plan. To no avail, I have repeatedly tried to focus him away from the conspiracy and onto the relevant issues of the case. His defense plan includes the following:

a. Mr. Dickinson is convinced that the accused cannot get a fair trial because the Fort Carson community has made up its mind against the accused. CPT Bleam has assured me that this has not been a high profile case as far as the community is concerned and that there has been little or no press coverage. Mr. Dickinson's response was that we should enroll some college students to conduct an informal telephone survey of the Fort Carson community and use the results in a change of venue motion.

b. Mr. Dickinson is determined to attack the accused's chain-of-command and label them all as drug users (based upon the accused's assertion) via an unlawful command influence motion. I have repeatedly told him there is no evidence to support the motion.

c. Mr. Dickinson intends to attack the trial counsel for her alleged unlawful command influence, i.e., professional misconduct, concerning the motion to disqualify Mr. Gotten. I have repeatedly told Mr. Dickinson that the

trial counsel's actions were reasonable based upon the evidence.

* * *

6. Mr. Dickinson has a conflict of interest. On a number of occasions, Mr. Dickinson has raised issues that are not relevant to the accused's defense, but rather concern the allegations against Mr. Gotten. The most egregious example is his unwillingness to force Mr. Gotten to turn over his files. Mr. Gotten promised the court, in Mr. Dickinson's presence, that he would turn over his files. It now appears the Mr. Dickinson is unwilling to force the issue because of his relationship with Mr. Gotten. We are now a week away from our motions hearings and the lead counsel told me he doesn't have any of the discovery in the case.

7. I am convinced that if Mr. Dickinson continues to represent the accused, the accused's interests will suffer. I do not believe Mr. Dickinson is a competent attorney and I believe he is incompetent to represent any soldier at a court-martial. My current relationship with Mr. Dickinson is very good. I have been straightforward and blunt with him on every issue except the conflict of interest. However, I do not believe my efforts to focus him on the relevant issues of the case have been successful or will be successful in the future. The bottom line is that I believe the defense of the accused will be ineffective. I believe further participation in the case could jeopardize CPT Bleam's and my good standing to practice law.

s/_____
MICHAEL R. CLARKE
CPT, JA
Senior Defense Counsel

CF:
CPT Bleam